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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RACHEL ANGEL CHAVEZ, Defendant and Appellant.	G041428 (Super. Ct. No. 07WF1920) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregg L. Prickett, Judge. Affirmed.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Gil Gonzalez and Tami Falkenstein Hennick, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Defendant Rachel Angel Chavez was convicted, as an aider and abettor, of two counts of attempted murder and one count of aggravated assault. Her presence at the scene of the crime was uncontroverted. On appeal, defendant argues the trial court unnecessarily and erroneously instructed the jury that an aider and abettor need not be present at the scene of the crime for liability to attach. She contends the claimed error was prejudicial because the court allowed the prosecution to argue it had exceeded its burden of proof, effectively allowing the prosecutor to equate presence with guilt.

We affirm. The trial court did not err in giving the instruction for three reasons. First, defendant ignores the portion of the instruction that stated presence alone is insufficient for finding guilt as an aider and abettor. Second, defendant admitted she was aware of the possibility of harm or death resulting from her actions and she nevertheless wielded and threw a lug wrench and a beer bottle during the fight instigated by her gang companions. Third, she also admitted providing backup for the gang. It was not reasonably likely that the jury was misled into failing to consider the relevant evidence when it determined guilt.

Even if an instructional error had occurred, it would not be prejudicial because the jury did not convict defendant based on her presence at the scene alone; it convicted based on her knowledge and actions. Further, the jury was told to consider the instructions in light of their findings about the facts of the case.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On August 11, 2007, the Niutapuai family lived on Homer Street, in Westminster. None of the family members had any gang affiliation. Brothers Jesse, Joseph, and Johnny, and their friend Patrick Harrigan were in the Niutapuais' backyard

barbequing and drinking beer.[1] At about 11:30 p.m. or 12:00 a.m., a car stopped in front of the house, and six or seven Hispanic males exited the vehicle, yelling and screaming as they walked toward the house. A Ford sport utility vehicle pulled up behind the first car soon thereafter and its passengers—including defendant—exited, bringing the approximate total to 15 Hispanic males and defendant.[2] The vehicles' occupants were yelling, "'[t]his is West Trece,'" "W-13," "West Trece," and "'[t]his is our neighborhood.'" The majority of the assailants appeared to have knives, and the remainder appeared to have other weapons, including an ice pick, a screwdriver, a shank, a hammer, a bat, bricks, beer bottles, and PVC pipes.

Defendant was carrying a lug wrench and a beer bottle. Harrigan heard someone say, "I'm going to effing kill you" before the assailants charged toward the house. Johnny heard the assailants say they were going to kill the brothers. The brothers and Harrigan moved to the front of the house to ward off the attack. Other members of the family (including Jimmy, Justin and their sister) and friends (including Jimmy's girlfriend Tofi) who had been inside the house came outside.

Defendant walked toward the front of the house and threw a beer bottle, which shattered as it hit a Chevrolet Suburban parked in the driveway. A piece of glass from the bottle struck Johnny in the head. She then threw the lug wrench, which also struck the Suburban's windshield, shattering it two feet from Justin. A melee ensued in the front yard and in the street.[3] Joseph was stabbed in the back with an ice pick or knife, puncturing his lung. Johnny was cut on the arm. Jimmy was struck multiple times in the

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[1] Joseph and Johnny Talaeai and Jesse, Jimmy, and Justin Niutapuai are brothers, despite having different last names. We will refer to the brothers by their first names to avoid confusion; we intend no disrespect.

[2] The estimates given by witnesses of the number of people present varied from 12 to 25, but all that is necessary for purposes of this appeal is that there were many Hispanic males and one Hispanic female present at the scene.

[3] Estimates of the length of the fight ranged from two to 20 minutes.

back with a hammer. Early in the fight, defendant was struck and knocked down by Tofi, Jimmy's girlfriend.

At some point during the melee, the driver of the Ford sport utility vehicle drove directly into the Niutapuai brothers, attempting to injure them. Some of the assailants reentered the vehicle and drove away. The other assailants fled, either on foot or in the first vehicle.

At approximately 1:00 a.m. on August 12, a Ford Explorer was stopped in Huntington Beach by Westminster Police. Defendant was one of five people in the vehicle. A folding knife was found on Vincent Ortiz, another passenger. A hammer was on the floor in front of the rear row of seats. A screwdriver with blood on it was between the passenger seats.

When defendant was interviewed by Detective William Drinnin of the Westminster Police Department, she acknowledged the possibility of someone being hurt or killed if her gang was in a fight and weapons were present. She also admitted being at a fight the previous night with other members of her gang. Defendant admitted her purpose in being in the vehicle was to provide "backup." She also said she was hit and knocked to the ground during the fight. Defendant had a cut on her forehead and her right hand was cut and swollen. She claimed she was unaware there were any weapons in the Ford Explorer.

Defendant was charged with two counts of premeditated attempted murder (Pen. Code, §§ 664, subd. (a), 187, subd. (a) [counts 1 and 2]), aggravated assault (Pen. Code, § 245, subd. (a)(1) [count 3]), and street terrorism (Pen. Code, § 186.22, subd. (a) [count 4]). The information alleged counts 1, 2, and 3 were committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist criminal conduct by gang members. (Pen. Code, § 186.22, subd. (b)(1)). Defendant was alleged to have suffered two prior convictions under the "Three Strikes" law (Pen. Code, §§ 667, subds. (d) & (e)(2)(A),

1170.12, subds. (b) & (c)(2)(A)), two or more serious felonies (Pen. Code § 667, subd. (a)(1)), and one prior prison term (Pen. Code, § 667.5, subd. (b)).

A jury convicted defendant of all charges, and found the gang enhancement true, but found the premeditation charge untrue. In bifurcated proceedings, two of the prior conviction allegations were dismissed, but one prior conviction and one serious felony allegation were found true. The trial court sentenced defendant to an aggregate sentence of 29 years, calculated as follows: on count 1, a term of 14 years; on the attendant gang enhancement, 10 years; enhanced by five years for the prior serious felony. Sentences on the remaining counts and enhancements were stayed or ordered to run concurrently with the sentence for count 1.

DISCUSSION

A. *No Instructional Error*

The trial court read the following jury instruction, based on CALCRIM No. 401: "Someone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose. And he or she specifically intends and does in fact aid, facilitate, promote, encourage or instigate the perpetrator's commission of that crime. [¶] If all these requirements are proved, the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor. *If you conclude that the defendant was present at the scene of the crime, or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not by itself make him or her an aider and abettor*." (Italics added.)

Defendant argues it was error to read the italicized portion of the jury instruction relating to presence at the scene "as there was no argument that she was not

there."[4] Defendant concedes "CALCRIM No. 401 correctly states the controlling principles . . . ." (*People v. Stallworth* (2008) 164 Cal.App.4th 1079, 1103-1105.) She argues instead that the instruction was irrelevant because defendant was at the scene and the jury was misled into failing to consider relevant evidence, and was effectively told to equate presence with guilt. An instruction is misleading if "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents consideration of constitutionally relevant evidence." (*Boyde v. California* (1990) 494 U.S. 370, 380.)

A prosecutor must prove an aider and abettor had knowledge of the perpetrator's criminal purpose and the intent to encourage or facilitate that purpose in order to obtain a conviction. (See *People v. Williams* (2008) 43 Cal.4th 584, 636; *People v. Mendoza* (1998) 18 Cal.4th 1114, 1123.) An aider and abettor is also guilty of "any reasonably foreseeable offense committed by the perpetrator. . . . [Citation.]" (*People v. Avila* (2006) 38 Cal.4th 491, 564; *People v. Prettyman* (1996) 14 Cal.4th 248, 260-262.)

A sentence in the instruction itself directly rebuts defendant's assertion that the jury was misled into failing to consider relevant evidence. That sentence informed the jury that presence alone is insufficient for a finding of guilt as an aider and abettor. We infer the jury followed this instruction and considered other relevant evidence.

The evidence in this case does not support defendant's assertion that the controverted instruction confused the jury or relieved it from making findings on relevant issues. The jury was asked to consider whether defendant had knowledge of her companions' criminal purpose and whether she had the intent to encourage or facilitate that purpose. The evidence supported the jury's verdict. First, defendant joined her

[4] Defense counsel objected to this portion of CALCRIM No. 401 being read to the jury, but the objection was overruled.

companions in instigating the fight by throwing a lug wrench and beer bottle in the direction of the victims. Second, she acknowledged that a person could be injured or killed if her gang got in a fight using weapons. Third, defendant's admitted purpose was to provide backup for her gang companions. Therefore, the jury had sufficient evidence to find defendant guilty.

It is not reasonably likely that the jury disregarded the overwhelming evidence of defendant's guilt because of the inclusion of the challenged language. The jury was expressly instructed that presence alone was not sufficient to find defendant guilty. Her admitted active involvement in the group's acts was the evidence most relevant to a determination of her guilt. There was no error.

B. *Prejudice*

Even if we were to conclude the trial court erred in instructing the jury regarding presence at the scene, any error was harmless. Defendant argues the error was prejudicial because the court allowed the prosecutor to argue it had exceeded its burden of proof, effectively allowing the jury to equate presence with guilt, thus directing the verdict. She contends that her not guilty pleas put all elements of each offense in issue, including her presence and intent.[5] The cases she cites do not help her, however. Both *People v. Flood* (1998) 18 Cal.4th 470, 506-507, and *People v. Figueroa* (1986) 41 Cal.3d 714, 719-722, involved omitted instructions, with reversible error only found in the latter because the jury was not instructed on the burden of proof. While *People v. Saddler* (1979) 24 Cal.3d 671, 683-684, involved an irrelevant instruction given to the jury over defense counsel's objection, the court found the error harmless because significant circumstantial and direct evidence established the defendant's guilt, and

[5] We note that defendant argues, inconsistently, both that her presence was not controverted and that her not guilty pleas put her presence in issue.

because the jury was given additional instruction that they should "'disregard any instruction which applies to a state of facts which you determine does not exist.'" Here, as discussed *ante*, there was strong evidence of defendant's guilt. Additionally, the jury was instructed that "[s]ome of these instructions may not apply, depending on your finding about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts." The jury is presumed to have followed this instruction. (*People v. Ledesma* (2006) 39 Cal.4th 641, 684.)

Under state law, reversal is required for instructional error if "'it is reasonably probable that a result more favorable to the [appealing party] would have been reached in the absence of the error.'" (*People v. Wims* (1995) 10 Cal.4th 293, 315, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) Therefore, even if an error was committed, defendant would have to show it is reasonably probable the jury would have reached a different conclusion with respect to the charges if not instructed regarding her presence at the scene. The most significant evidence against defendant was her admitted action in concert with her gang companions as they instigated a fight with the Niutapuai brothers. Even if the court erred in including the portion of the instruction regarding presence at the scene, defendant's presence was not the primary consideration in determining her guilt; her knowledge and actions were. Defendant has failed to show a reasonable probability that she would have obtained a more favorable result if the trial court had not read the portion of CALCRIM No. 401 addressing presence at the scene, and any error was therefore harmless.

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

SILLS, P. J.

BEDSWORTH, J.